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ORIGINAL

Arizona Corporation Commission  
ZONA CORPORATION COMMISSION  
DOCKETED

JAN 23 2001

1 WILLIAM A. MUNDELL  
2 CHAIRMAN  
3 JIM IRVIN  
4 COMMISSIONER  
5 MARC SPITZER  
6 COMMISSIONER

DOCKETED BY	JW
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7 IN THE MATTER OF INVESTIGATION )  
8 INTO U S WEST COMMUNICATION, )  
9 INC.'S COMPLIANCE WITH CERTAIN )  
10 WHOLESALE PRICING REQUIREMENTS )  
11 FOR UNBUNDLED NETWORK ELEMENTS )  
12 AND RESALE DISCOUNTS. )

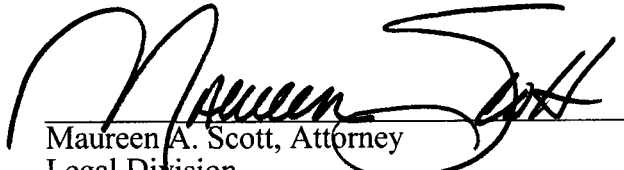
DOCKET NO: T-00000A-00-0194

NOTICE OF ERRATA FILING

13 On Monday, January 22, 2001, the Arizona Corporation Commission Staff ("Staff")  
14 filed its Response of Staff to Qwest Corporation's Motion for Reconsideration. This Errata is being  
15 filed to correct typographical errors. Page 3, line 27.5, footnote 3, after "2000))", the sentences with  
16 the corrections should read: "The Eighth Circuit has granted the FCC's request for partial stay of  
17 the decision vacating 47 CFR Section 51.505(b)(1) pending further proceedings in the Supreme  
18 Court. The Supreme Court granted the FCC's petition for writ of certiorari 2001 WL 46229 (U.S.  
19 2001) along with four other petitions filed on the Eighth Circuit Court's decision." On page 3, line  
20 6 the words "rules on of" are replaced with "ruling on".

21 Staff has attached to this Notice, the Errata version of its Response.

22 RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of January, 2001.

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1 The ORIGINAL and ten (10) copies of the  
2 foregoing were filed this 23<sup>rd</sup> day of January,  
2001 with:

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31 00-0194 Response of Staff to Qwest's Reconsideration Motion

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 WILLIAM A. MUNDELL  
CHAIRMAN

3 JIM IRVIN  
COMMISSIONER

4 MARC SPITZER  
COMMISSIONER

5  
6 IN THE MATTER OF INVESTIGATION )  
7 INTO U S WEST COMMUNICATION, )  
8 INC.'S COMPLIANCE WITH CERTAIN )  
9 WHOLESale PRICING REQUIREMENTS )  
FOR UNBUNDLED NETWORK ELEMENTS )  
AND RESALE DISCOUNTS. )

**DOCKET NO: T-00000A-00-0194**

10 **RESPONSE OF STAFF TO QWEST CORPORATION'S**  
11 **MOTION FOR RECONSIDERATION**

12 **I. INTRODUCTION.**

13 On January 11, 2001, Qwest Corporation, Inc. ("Qwest") filed a Motion for  
14 Reconsideration of the Commission's December 14, 2000 Procedural Order which clarified, at the  
15 request of Staff, that Phase II of this proceeding is to include a review of Qwest's current unbundled  
16 network element ("UNE") rates for, inter alia, compliance with the reinstated FCC pricing rules.  
17 Qwest raises no new arguments in its Motion that were not exhaustively addressed during the oral  
18 argument on December 7, 2000 on this matter, and therefore, its Motion for Reconsideration should  
19 be rejected. Hearing Officer Rodda correctly decided that Phase II of this proceeding should include  
20 a review of Qwest's current UNE rates for: (1) compliance with the reinstated FCC pricing rules and  
21 to: (2) carry out the expressed desires of the Commissioners when the rates were adopted that such  
22 a review would be conducted after the rates had been in effect for a reasonable period of time.

23 **II. DISCUSSION.**

24 **A. The FCC's Pricing Rules Were Not In Effect at the Time the Commission**  
25 **Adopted Qwest's UNE Rates and It is Appropriate For the Commission to Make**  
26 **a Determination in this Docket that the UNE Rates Comply with the Reinstated**  
**FCC Rules.**

27 At the time that the Commission adopted Qwest's UNE rates, the FCC's pricing rules  
28 were not in effect but had been vacated by the United States Court of Appeals for the Eighth Circuit

1 on jurisdictional grounds.<sup>1</sup> However, after the rates took effect, the United States Supreme Court  
2 reversed the Eighth Circuit's ruling and found that the FCC had authority to adopt the rules and  
3 remanded the case to the Eighth Circuit for a decision on the merits.<sup>2</sup> As a result of the United  
4 States Supreme Court's ruling, the FCC's pricing rules were reinstated and remain in effect today.<sup>3</sup>

5 Qwest relies, in part, upon statements made by the Commission Staff in its Post  
6 Hearing Brief filed with the Arizona District Court in the consolidated arbitration appeals to support  
7 its contention that its UNE rates comply with the FCC pricing rules. *See* Qwest Motion at pp. 4-8.  
8 Qwest's reliance upon the Staff's brief is misplaced. It is not the Staff that must find that Qwest's  
9 UNE rates comply with the FCC's reinstated pricing rules, rather it is the Commission that must  
10 make the requisite finding. The Commission has made no such finding to date. In addition, the  
11 Staff's primary argument before the Arizona District Court was that the Court should allow the  
12 Commission to address the impact of the Supreme Court's ruling in the first instance. The  
13 Commission has not yet done so.

14 Qwest also relies upon statements contained in the Commission's Decision No.  
15 60635 which adopted the underlying statewide UNE rate. (Decision No. 60635, January 30, 1998  
16 at 39.) Once again, Qwest's reliance upon Decision No. 60635 is misplaced. The FCC's pricing  
17 rules were not in effect at the time the Commission entered Decision No. 60635. Qwest also  
18 apparently relies upon the mistaken notion that the Commission adopted the Hatfield Model, the  
19 costing model proffered by AT&T in that case. Contrary to Qwest's assertions, the Commission did  
20 not adopt the Hatfield Model in whole, but rather explicitly stated in its Order that it was not  
21 adopting either the Hatfield Model or the Qwest Model because of known problems with both. *Id.*  
22 at p. 6. In summary, nowhere in Decision No. 60635, does the Commission find that the UNE rates  
23 it adopted complied with all of the FCC's pricing rules which were not even in effect at that time that  
24 the Decision was issued.

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26 <sup>1</sup> *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997).

27 <sup>2</sup> *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

28 <sup>3</sup> While on remand, the Eighth Circuit once again vacated several of the FCC's pricing rules on the grounds that they were not consistent with the 1996 Act, (*Iowa Utilities Board v. FCC*, 219 F.3d 744 (8<sup>th</sup> Cir. 2000)). The Eighth Circuit has granted the FCC's request for partial stay of the decision vacating 47 CFR Section 51.505(b)(1) pending further proceedings in the Supreme Court. The Supreme Court granted the FCC's petition for writ of certiorari 2001 WL 46229 (U.S. 2001) along with four other petitions filed on the Eighth Circuit Court's decision.

1  
2 Qwest also argues that the Arizona District Court found that the two-wire UNE rates  
3 comply with the FCC's requirement of TELRIC-based pricing and, therefore, any review by this  
4 Commission is unnecessary. Qwest Motion at p. 8. However, a review of Federal District Court  
5 Judge Panner's decision quickly reveals that the Court never considered the reinstated rules in its  
6 ruling on the issues raised in that appeal. At page 1009 of its decision, the Court stated:

7 Some parties have urged this court to apply those reinstated FCC regulations  
8 when reviewing the ACC decisions and interconnection Agreements at issue  
9 here. The Court declines to do so. Those regulations were not in effect when  
these Agreements were negotiated by the parties and approved by the ACC.

10 In summary, Qwest's reliance upon: (1) statements made by the Staff in a brief, (2)  
11 statements by the District Court in its decision which did not even consider the impact of the  
12 reinstated rules, and (3) statements of the Commission in an Order which was adopted at a time  
13 when the pricing rules were not in effect, is misplaced. Similarly misplaced is Qwest's attempt to  
14 use those statements and imply that they are tantamount to a Commission finding that the UNE rates  
15 adopted over three years ago comply with the FCC's reinstated pricing rules.

16 **B. It is Appropriate to Review Qwest's UNE Rates at this Time For Other Reasons**  
17 **and Such a Review Should be Done in this Docket.**

18 As both AT&T and WorldCom point out in their Responses, it is appropriate for  
19 other reasons to review Qwest's UNE rates at this time. It is clear when one reads the transcripts of  
20 the Open Meetings at which Qwest's UNE rates were adopted, that the Commissioners contemplated  
21 that the UNE rates would remain in place for approximately one year and would be subject to review  
22 again at that time. See Transcript, Consolidated Arbitration Deliberations, October 28, 1997, p. 29,  
23 L 13-23. Moreover, it is equally clear that a review of the statewide UNE rate was also contemplated  
24 at the July 18, 2000 Open Meeting when the Commission adopted interim geographically deaveraged  
25 UNE rates for Qwest's competitors. During the course of discussion, the Chief Hearing Officer  
26 stated in response to a question by one of the Commissioners that Phase II would include a review  
27 of the statewide UNE rates as a result of several Court decisions which resulted in changes to the  
28

1 FCC rules since the original rates were adopted. See Transcript of July 18, 2000 Open Meeting at  
2 p. 22.

3 Moreover, since the Commission will be adopting permanent geographically  
4 deaveraged UNE rates for Qwest in Phase II, it would be inappropriate from both a cost and timing  
5 perspective not to examine the underlying statewide UNE rate at this time. Staff does not agree with  
6 Qwest that such a review will significantly expand the scope of Phase II beyond that already clearly  
7 contemplated by the Commission. See Qwest Motion at p. 12.

8 Finally, the Commission should also reject Qwest's attempts to distinguish the recent  
9 pronouncements by the United States Department of Justice with regard to Verizon's rates in  
10 Massachusetts in conjunction with its attempt to obtain authority to provide InterLATA long distance  
11 service under Section 271 of the 1996 Act. Qwest's Motion at pps. 8-12. Qwest's application for  
12 271 authority has been pending in Arizona for approximately two years now and the Staff as well  
13 as Qwest and many of the CLECs have expended considerable time and effort over this two year  
14 period evaluating Qwest's Application to determine whether Qwest meets the requirements of the  
15 1996 Act. Qwest's UNE rates will be an important part of its Application when filed with both the  
16 Department of Justice and the FCC. If Qwest's rates have not been found to be in compliance with  
17 the FCC's reinstated pricing rules or if it is found that the rates are preventing competition in the  
18 relevant markets, Qwest's Application is, in Staff's opinion, unlikely to be successful. Therefore,  
19 it is appropriate for the Commission to undertake a review of the UNE rates and their impact on  
20 CLEC entry into the residential local exchange market at this time.

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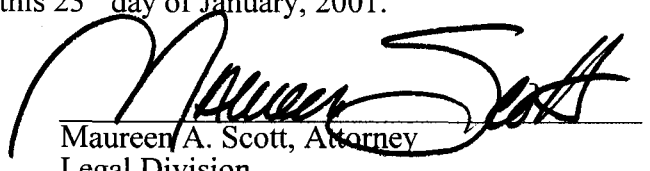
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**III. CONCLUSION.**

For all of the above reasons, Staff respectfully requests that Qwest's Motion for Reconsideration be denied. The Hearing Officer's resolution of the issues was correct and should not be reconsidered.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of January, 2001.



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